



UNITED STATES GOVERNMENT  
**NATIONAL LABOR RELATIONS BOARD**  
FREEDOM OF INFORMATION ACT BRANCH  
Washington, D.C. 20570

Via email

September 16, 2021

Re: FOIA Request NLRB-2021-000062

Dear Kara Bell (Judicial Watch):

This is in response to your request, under the Freedom of Information Act (FOIA), 5 U.S.C. § 552, received on October 20, 2020, in which you initially sought the following records for the period October 1, 2019 thru October 20, 2020:

1. Records identifying policies and procedures, training materials, contracts, proposals or requests for proposals, and communications regarding the implementation and use of virtual communication tools, programs, and other meeting platforms, including but not limited to Microsoft Teams, Google Duo, Zoom, Slack, Go-To-Meeting/Go-To-Webinar, or bespoke solutions on both classified and unclassified systems.
2. Records documenting or analyzing applied agency practices, including records documenting technical assistance, for the capture, preservation, and management of records from virtual communication tools, programs, and other meeting platforms utilized by the agency.

You assumed fees up to \$37.00 but also requested a fee waiver for the processing of your request.

We acknowledged your request on October 20, 2020. In an [email communication](#) dated October 26, 2020, a member of my staff informed you that the FOIA Branch would be taking the statutory extension of time to respond to your request due to our need to consult with and search in two or more Agency offices. By email on October 27, 2020, you agreed to narrow the scope of your request to "Records, including emails, identifying any policies, procedures, training materials, or communications concerning the capture, preservation, and management of records from the virtual communication platform(s) used by the National Labor Relations Board." The date range remained the same. We regret the delay in our final response.

Pursuant to the FOIA and your narrowed request, search inquiries were directed to the Agency's Office of the Chief Information Officer, the Division of Operations-Management, the Division of Judges, the Office of the Solicitor, the Office of the

Executive Secretary (ES Office) and Records Management. Further searches were also conducted of the Agency's public website and intranet, SharePoint Online, to locate responsive policies and training materials. During the requested time frame, Zoom for Government and Microsoft Teams were both utilized by the Agency.

Our various searches yielded 341 pages of releasable responsive records, provided to you in the form of five separate PDFs, which are attached and explained below.

- The first PDF attachment, consisting of 22 pages of records, provides background on the Agency's decision to utilize the Zoom for Government platform ("Zoom") to conduct its unfair labor practice and representation case hearings remotely during the pandemic.
- The second PDF attachment, consisting of 35 pages, is a user guide and power point presentation that were prepared for Agency employees on using the MS Teams platform.
- The third PDF attachment, consisting of 187 pages, contains 28 different NLRB Administrative Law Judge (ALJ)s' Orders and Instructions from mid-June through mid-October 2020 that were issued to parties with information on how the administrative hearing would be run using the Zoom/videoconferencing technologies. These records were located in our search of the files of the lead ES Office official responsible for coordinating the Agency's transition to the remote ULP hearings program. Obviously, this subset of records was collected/saved together early in the program and does not reflect every ALJ Order and Instruction that issued during the requested time frame; however, any Order or Instruction would have contained similar directions explaining that the record of the hearing would be memorialized, as it had been done prior to the pandemic/implementation of remote hearings, pursuant to the Agency's authorized court reporting services.
- The fourth PDF attachment, consisting of 92 pages, also from the files of the lead ES official, contains responsive training materials that were sent to Agency employees and some to outside parties, including records explaining how parties could utilize a secure SharePoint webpage for uploading and sharing documents/exhibits in cases set for remote hearing.
- The fifth PDF attachment, consisting of 5 pages from the Agency's intranet, contains further guidance and training that was shared with Agency employees about the use of Zoom.

After a thorough review of the responsive records, I have determined that portions of them are exempt from disclosure under FOIA Exemptions 4, 6, 7(C) and 7(E), 5 U.S.C. § 552(b)(4), (b)(6), (b)(7)(C), and (b)(7)(E). Other responsive records are being withheld in their entirety pursuant to FOIA Exemptions 4 and 5, 5 U.S.C. § 552(b)(4) and (b)(5), as more fully discussed below.

Some responsive records are being withheld, and a few of the attached records contain redactions, pursuant to FOIA Exemption 4, 5 U.S.C. 552 (b)(4). Exemption 4 protects "commercial or financial information obtained from a person [that is] privileged or confidential." 5 U.S.C. § 552(b)(4). Here, the withheld records are training guides about running hearings virtually that were prepared by an outside vendor and identified as trademarked. Because the submitter does not customarily release this information to the public and it is not available to the public from any other sources, the information is confidential for purposes of Exemption 4. *Food Marketing Institute v. Argus Leader Media*, 139 S.Ct. 2356, 2363 (2019).

Other responsive records are being withheld in their entirety pursuant to FOIA Exemption 5, including internal draft documents, emails between Administrative Law Judges as well as Agency Headquarters staff, notes and memoranda regarding research and planning the hearing program, training materials regarding the Agency's case processing, and other internal suggestions, alternatives, or recommendations. Exemption 5 allows agencies to withhold inter-agency or intra-agency records which would not be available by law to a party other than an agency in litigation with the agency, and covers records that would "normally be privileged in the civil discovery context." 5 U.S.C. § 552 (b)(5); *NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 149 (1975). The deliberative process and attorney work-product privileges are two of the primary privileges incorporated into Exemption 5.

The deliberative process privilege protects the internal decision-making processes of government agencies to safeguard the quality of agency decisions. *Competitive Enter. Inst. v. OSTP*, 161 F. Supp.3d 120, 128 (D.D.C. 2016). The basis for this privilege is to protect and encourage the creative debate and candid discussion of alternatives. *Jordan v. U.S. Dep't. of Justice*, 591 F.2d 753, 772 (D.C. Cir.1978). Two fundamental requirements must be satisfied before an agency may properly withhold a record pursuant to the deliberative process privilege. First, the record must be predecisional, *i.e.*, prepared in order to assist an agency decision-maker in arriving at the decision. *Renegotiation Bd. v. Grumman Aircraft Eng'g Corp.*, 421 U.S. 168, 184 (1975); *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 151 (D.C. Cir. 2006). Second, the record must be deliberative, *i.e.*, "it must form a part of the agency's deliberative process in that it makes recommendations or expresses opinions on legal or policy matters." *Judicial Watch, Inc. v. FDA*, 449 F.3d at 151 (quoting *Coastal States Gas Corp. v. U.S. Dep't of Energy*, 617 F.2d 854, 866 (D.C. Cir. 1980)). To satisfy these requirements, the agency need not "identify a specific decision in connection with which a memorandum is prepared. Agencies are . . . engaged in a continuing process of examining their policies; this process will generate memoranda containing recommendations which do not ripen into agency decisions; and the lower courts should be wary of interfering with this process." *Sears, Roebuck & Co.*, 421 U.S. at 151 n.18 (1975).

The attorney work-product privilege protects records and other memoranda that reveal an attorney's mental impressions and legal theories that were prepared by an

attorney, or a non-attorney supervised by an attorney, in contemplation of litigation. See *United States v. Nobles*, 422 U.S. 225, 239 n.13 (1975); *Hickman v. Taylor*, 329 U.S. 495, 509-10 (1947). Additionally, the protection provided by Exemption 5 for attorney work-product records is not subject to defeat even if a requester could show a substantial need for the information and undue hardship in obtaining it from another source. See *FTC v. Grolier, Inc.*, 462 U.S. 19, 28 (1983). Further, protection against the disclosure of work product records extends even after litigation is terminated. *Id.* The attorney work-product privilege extends to records prepared in anticipation of both pending litigation and foreseeable litigation and even when no specific claim is contemplated at the time the attorney prepared the material. *Schiller v. NLRB*, 964 F.2d 1205, 1208 (D.C. Cir. 1992). Furthermore, the privilege protects any part of a record prepared in anticipation of litigation, not just the portions concerning opinions and legal theories, see *Judicial Watch v. U.S. Dep't of Justice*, 432 F.3d 366, 371 (D.C. Cir. 2005), and is intended to protect an attorney's opinions, thoughts, impressions, interpretations, analyses and strategies. *Id.*; see also *Wolfson v. United States*, 672 F. Supp.2d 20, 29 (D.D.C. 2009). See *Judicial Watch*, 432 F.3d at 371 (finding that an agency need not segregate and disclose non-exempt material if a record is fully protected as work product).

Here, the redacted portions of the attached records and the withheld records meet the requirements for Exemption 5 protection under the deliberative process and attorney work product privileges. They are internal, predecisional, and reflect the deliberative and consultative process of the Agency that Exemption 5 protects from forced disclosure. *Sears, Roebuck & Co.*, 421 U.S. at 150-52. The records reflect the analysis and opinions of Agency staff and attorneys created to assist superiors in their decision-making process regarding the litigation of cases during the pandemic and instituting the remote ULP hearings program. Exemption 5 may be properly applied to certain responsive Agency records to protect the Agency's internal communications by and among its staff as they engage in the debate and analysis of policies, practices, strategies, and case processing matters before it. *Sears, Roebuck and Co.*, 421 U.S. at 150-52.

Other responsive records have been partially redacted under FOIA Exemptions 6 and 7(C) since disclosure of the redacted information could constitute an unwarranted invasion of privacy.

Exemption 6 permits agencies to withhold information about individuals in "personnel and medical and similar files" where the disclosure of the information "would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6). *Am. Immigration Lawyers Ass'n v. Exec. Office for Immigration Review*, 830 F.3d 667, 673 (D.C. Cir. 2016). The "files" requirement covers all information that "applies to a particular individual." *Ayuda, Inc. v. FTC*, 70 F.Supp.3d 247,264 (D.D.C. 2014) (citing *U.S. Dep't of State v. Wash. Post Co.*, 456 U.S. 595, 601-02 (1982)). "'Similar files' has been interpreted broadly to include '[g]overnment records on an individual which can be identified as applying to that individual.'" *Pavement Coatings*

*Technology Council v. United States Geological Survey*, 2019 WL 7037527, \*8 (D.D.C. Dec. 19, 2019) (quoting *Wash. Post Co.*, 456 at 602). See *Judicial Watch, Inc. v. FDA*, 449 F.3d 141, 198-199 (D.C. Cir. 2006) (Exemption 6 may exempt not just files, but personal information such as names and addresses). Exemption 7(C) permits agencies to withhold information compiled for law enforcement purposes where disclosure of the information “could reasonably be expected to constitute an unwarranted invasion of personal privacy.” 5 U.S.C. § 552(b)(7)(C); *U.S. Dep’t of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 756 (1989), see also *Brennan Center for Justice at New York University School of Law v. DOJ*, 2020 WL 1189091, \*3-4, (D.D.C. Mar. 12, 2020) (reaffirming that Exemption 7(C) imposes a “lower bar for withholding” than Exemption 6.).

Application of Exemptions 6 and 7(C) requires a two-part balancing test that considers: (1) whether there is a legitimate personal privacy interest in the requested information, and, if so; (2) whether there is a countervailing public interest in disclosure that outweighs the privacy interest. *Judicial Watch, Inc. v. Nat’l Archives & Records Admin.*, 214 F. Supp. 3d 43, 58 (D.D.C. 2016), *aff’d*, 876 F.3d 346 (D.C. Cir. 2017), citing *Nat’l Archives & Records Admin. v. Favish*, 541 U.S. 157, 171 (2004). With respect to the first factor, the Supreme Court has described Exemptions 6 and 7(C) as reflecting privacy interests in “avoiding disclosure of personal matters,” *Reporters Comm.*, 489 U.S. at 762, maintaining the “individual’s control of information concerning his or her person,” *id.* at 763, avoiding “disclosure of records containing personal details about private citizens,” *id.* at 766, and “keeping personal facts away from the public eye,” *id.* at 769.

Here, the redactions made pursuant to Exemptions 6 and 7(C) to withhold identifying information of individuals referenced in the attached records is consistent with the privacy interests that individuals have in their name and personal information. By contrast, I perceive no countervailing public interest in disclosure. The public’s interest in disclosure depends on “the extent to which disclosure would serve the ‘core purpose of the FOIA,’ which is ‘contribut[ing] significantly to public understanding of the operations or activities of the government.’” *U.S. Dep’t of Def. v. Fed. Labor Relations Auth.*, 510 U.S. 487, 495 (1994) (emphasis in original), quoting *Reporters Comm.*, 489 U.S. at 775. No such public interest is evident here that outweighs the private interests identified above.

Finally, we have redacted non-public intranet web addresses and the identities and e-mail addresses of certain IT/system security professionals pursuant to Exemption 7(E), 5 U.S.C. 552 (b)(7)(E). Exemption 7(E) protects information related to the Agency’s use of certain techniques or procedures for law enforcement investigations, if such disclosure could reasonably be expected to risk circumvention of the law. This provision creates “a relatively low bar for the agency [to meet] to justify withholding.” *Blackwell v. FBI*, 646 F.3d 37, 42 (D.C. Cir. 2011). See also *Prechtel v. FCC*, 330 F. Supp. 3d 320, 334-335 (D.D.C. 2018). Here, release of non-public NLRB intranet addresses and of the named IT professionals would increase

the risk of unauthorized access to the Agency's IT and security systems, as well the electronic database housing the Agency's investigative case records, and thus could possibly interfere with the Agency's future law enforcement efforts. See, e.g., *Poitras v. DHS*, 303 F.Supp.3d 136, 159 (D.D.C. 2018) (withholding "protected internal e-mail addresses, non-public intranet web addresses, and a secure internal e-mail tool" because disclosure would increase risk of unauthorized access to agency's IT system); *Lapp v. FBI*, No. 14-160, 2016 WL 737933, at \*4-6 (N.D. W. Va. Feb. 23, 2016) (protecting access codes for criminal justice information system because disclosure could allow unauthorized access to non-public law enforcement information).

For the purpose of assessing fees, we have placed you in Category C, as a representative of the news media, in that you qualify as a person "actively gathering news for an entity that is organized and operated to publish or broadcast news to the public." NLRB Rules and Regulations, 29 C.F.R. § 102.117(d)(1)(vii). Accordingly, there is no charge assessed for this request. Given your placement as a news media requester, your request for a fee waiver was closed out as moot.

You may contact Marissa Wagner, the FOIA Attorney-Advisor who processed your request, at (202) 273-2957 or by email at [marissa.wagner@nrlb.gov](mailto:marissa.wagner@nrlb.gov), as well as the Agency's FOIA Public Liaison, for any further assistance and/or to discuss any aspect of your request. The FOIA Public Liaison, in addition to the FOIA Attorney, can further explain responsive and releasable agency records, suggest agency offices that may have responsive records, and/or discuss how to narrow the scope of a request in order to minimize fees and processing times. The contact information for the FOIA Public Liaison is:

FOIA Public Liaison  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [FOIAPublicLiaison@nrlb.gov](mailto:FOIAPublicLiaison@nrlb.gov)  
Telephone: (202) 273-0902  
Fax: (202) 273-FOIA (3642)

After first contacting the Agency, you may additionally contact the Office of Government Information Services (OGIS) at the National Archives and Records Administration to inquire about the FOIA dispute resolution services it offers. The contact information for OGIS is:

Office of Government Information Services  
National Archives and Records Administration  
8601 Adelphi Road-OGIS  
College Park, Maryland 20740-6001  
Email: [ogis@nara.gov](mailto:ogis@nara.gov)

Telephone: (202) 741-5770

Toll free: (877) 684-6448

Fax: (202) 741-5769

You may obtain a review of this determination under the NLRB Rules and Regulations, 29 C.F.R. § 102.117(c)(2)(v), by filing an administrative appeal with the Division of Legal Counsel (DLC) through FOIAonline at:  
<https://foiaonline.gov/foiaonline/action/public/home> or by mail or email at:

Nancy E. Kessler Platt  
Chief FOIA Officer  
National Labor Relations Board  
1015 Half Street, S.E., 4<sup>th</sup> Floor  
Washington, D.C. 20570  
Email: [DLCFOIAAppeal@nrlrb.gov](mailto:DLCFOIAAppeal@nrlrb.gov)

Any appeal must be postmarked or electronically submitted within 90 days of the date of this letter, such period beginning to run on the calendar day after the date of this letter. Any appeal should contain a complete statement of the reasons upon which it is based.

Please be advised that contacting any Agency official (including the Attorney-Advisor, FOIA Officer, or the FOIA Public Liaison) and/or OGIS does not stop the 90-day appeal clock and is not an alternative or substitute for filing an administrative appeal.

Sincerely,

*/s/ Synta E. Keeling*

Synta E. Keeling  
FOIA Officer

Attachments:

NLRB-2021-000062\_Policies & Announcements.pdf (22 pages)

NLRB-2021-000062\_MS Teams.pdf (35 pages)

NLRB-2021-000062\_Zoom Orders & Instr.pdf (187 pages)

NLRB-2021-000062\_Zoom etc Training Materials.pdf (92 pages)

NLRB-2021-000062\_Zoom Blogs.pdf (5 pages)